

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

MANHATTANVILLE COLLEGE
Employer

and

**Case No. 26-RC-8277
(formerly 2-RC-22327)¹**

MANHATTANVILLE FACULTY ALLIANCE,
Affiliated with NYSUT/AFT and AAUP
Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: ²

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find Manhattanville College (hereinafter referred to as the "Employer" or "College") is a private college in Purchase, New York. During the past 12 months, a representative period, the Employer has had gross annual operating revenue in

¹ The General Counsel issued an Order Transferring Case from Region 2 to Region 26. Pursuant to said Order, to the extent that further proceedings are appropriate to effectuate this Decision, this case will automatically transfer back to Region 2 and will continue as Case 2-RC-22327 except that Region 26 will retain jurisdiction only with respect to issues relating to the substance of this Decision.

² The Employer and the Petitioner filed timely briefs, which have been duly considered. The Petitioner, on September 12, 2001, sought to amend its petition to include instructors and exclude certain Program Directors. The amendment is untimely and hereby denied.

excess of \$1,000,000 and purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of New York. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. I find that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act.³

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

Petitioner seeks to represent “all full-time faculty, including Assistant Professors, Associate Professors, Full Professors, and Lecturers” employed by the College at its Purchase, New York campus. The exclusions include Deans; Assistant and Associate Deans; and visiting faculty. The College contends this Unit is not appropriate because the faculty members are managerial employees under the Supreme Court's holding in **NLRB v. Yeshiva University**, 444 U.S. 672 (1980). Alternatively, the College asserts the department chairs are supervisors within the meaning of Section 2(11) of the Act; thus, these individuals should be excluded from the Unit.

The Employer is a private, nonprofit college located in Purchase, New York. Its enrollment is approximately 1400 undergraduate students and 700 graduate students. The College employs approximately 70 full-time professors. Additionally, it employs about 120 adjunct professors.

³ In light of my finding, *infra*, that the faculty members seeking representation are managerial employees, and since the record evidence reflects the Petitioner is comprised solely of the managerial employees involved herein, I find the Petitioner does not represent statutory employees and therefore is not a labor organization. **Ithaca College**, 261 NLRB 577 (1982); **College of Osteopathic Medicine**, 265 NLRB 295 (1982).

A Board of Trustees, which consists of the President of the College and approximately 35 non-college individuals, formally operate the College. The President is responsible for the day-to-day operations of the College. The College's administrative officials are:

Richard Berman	-	President
Luis Losada	-	Provost
Catherine Myers	-	Acting Provost
Gabrielle Wickert	-	Dean of Studies
Sylvia Blake	-	Dean of School of Education
Mary Corrarino	-	Vice-President of Student Affairs/Legal Counsel Sebastian
Persico	-	Vice-President for Finance and Administration
Barry Ward	-	Vice-President for Enrollment Management
Jose Flores	-	Director of Admissions
Lea Rutmanowitz	-	Associate Provost
Denise Carson	-	Registrar/Special Assistant to Provost

The College has a School of Education, School of Graduate and Professional Studies and the undergraduate college. All 23 academic departments, except the School of Education, are located in the undergraduate college. A department chair, who reports to the Provost, heads each of the 22 undergraduate departments, except the Department of Library and Information Studies. In addition to the departments, there are 11 academic programs, headed by a chair or director. The School of Education is headed by a Dean and also has six program directors.

The College has bylaws, which govern the faculty and the administration of the College. The bylaws describe the faculty's authority as:

Within the framework of the concept of "primary responsibility" and subject to manpower and budgetary limitations, the College faculty shall determine policies and make decisions regarding curriculum, subject matter and methods of instruction, research, faculty status and those aspects of student life, which relate directly to the educational process.

The faculty and the Board of Trustees approve these bylaws. The bylaws are subject to revision and have been changed many times. In order for the bylaws to be changed, the proposed changes are submitted to the Faculty Steering Committee, which consists of faculty members, who are chosen by the faculty. The Faculty Steering Committee must approve any revisions and then submit the matter to the faculty for a vote. If the faculty rejects the proposed

change, such as when it rejected the creation of a Committee on Committees, then the bylaws are not changed. If the faculty approves the change in the bylaws, then the Board of Trustees must formally approve the change. The Board of Trustees routinely approves such changes and since approximately 1971 has rejected only one proposed bylaw change. Neither the President nor the Provost has the authority to change the bylaws and do not even submit proposals to the faculty to change the bylaws.

The faculty has regular meetings, which are conducted by the Chair of the Faculty, an elected position of the faculty. The entire faculty has voting rights at faculty meetings. Additionally, the President, Provost and Dean attend faculty meetings and technically have voting rights but have never exercised them. Students can also attend faculty meetings but do not have the right to vote. At the faculty meetings, the faculty vote to approve or reject faculty committee recommendations. The faculty, by a majority vote, regularly meets in executive session, wherein the College's administrators are required to leave.

The faculty has a number of committees including the Academic Policy Committee (APC), Faculty Budget Committee, Faculty Status Committee, Faculty Compensation Committee, Board of Academic Standards, Faculty Steering Committee and Admissions Committee. These faculty committees consist of faculty members plus the President, Provost and/or Dean as ex-officio members. As such, the President, Provost and Dean have never voted in a faculty committee meeting.

The curriculum of the College is approved, developed and administered by the faculty. President Berman said to the faculty on September 13, 2000, "The faculty must now take the lead, take ownership with the Provost to define and develop the undergraduate curriculum". The individual professors determine the courses that they will teach on a semester-by-semester basis without interference from the Provost or any College administration official. Professors' specialties, the required undergraduate courses and the required courses for a major or second area of strength (minor) are all considerations that professors use in determining which courses

they will teach.⁴ Furthermore, each professor determines whether to limit the number of students in a course and what the limit will be. Individual professors decide whether to have an attendance policy and what it will be. The faculty of the Music Department drafted its own department policies, including attendance at applied music lessons and senior requirements, about 20 years ago and these policies are provided and apply to all music students.

The faculty determines the number of sections and the days and times for the courses within a “scheduling grid” although each semester the registrar sends out a notice about too many classes being in the middle of the day and requests professors to volunteer to change their schedule. Some professors agree to change their schedule but no one has ever been forced to do so. Additionally, the registrar may suggest the appropriate number of sections of a course, but it is the faculty’s decision. If an insufficient number of students register for a particular course in the registration period, then the registrar sends an e-mail to the department chair advising him on this matter and asking whether this course should be dropped. At that time, the department chair and applicable professor make a determination about the necessity for the course. If it is not deemed necessary for a major or otherwise important to offer, then the department chair will advise the registrar to drop the course. Additionally, when a course is over-registered, the registrar will request the department chair to add an additional section for that course and then the department chair will determine the feasibility of such.

The faculty is responsible for submitting the course descriptions for the college catalog. The procedure for submitting such information varies from department to department, with most having the particular professor, who was teaching that course; submit the course description or an update to the course description. In some programs and small departments, the chair is the only full-time faculty member; thus, the chair is responsible for submitting all of the information for that department or program.

⁴ The Petitioner asserts the Provost ordered a course be taught in the fall, instead of the summer, but Professor Mboji testified that he spoke with the Provost and after consideration agreed with the decision.

The College's 1999 Self-study Report for the Middle States Association of Colleges stated individual faculty members decide their curriculum.⁵ As Professor Murray testified at the hearing, "Individual faculty members have autonomy in what they teach".⁶ Furthermore, Murray testified individual departments determine the requirements of the department, such as whether a senior thesis is required and the level needed to be an honors graduate. Professor James Bryan, the Provost from 1991 to 1997 and a member of the Petitioner, testified he never ordered a professor to teach or not teach a particular course.

The faculty is involved in the renaming or restructuring of departments. Specifically, the faculty proposed the re-naming of the Department of Religion to the World Religions Department and the full faculty thereafter approved it. Then, the Board of Trustees gave its approval of this change. A similar process occurred with the proposed restructuring of the Education Department to the School of Education and thereafter the full faculty also approved it.

The Academic Policy Committee (APC) must approve any curriculum changes. The APC is composed of six faculty members, who are appointed by the faculty to the committee, as well as two ex- officio members, the Provost and the Dean, who have a "voice but no vote". According to the faculty's by-laws, the APC "shall formulate policy recommendations to the faculty on degree requirements, educational programs, academic resources, and the academic calendar.... It shall review annually the entire curriculum, examining such problems as distribution of level, balance in course offerings and major requirements, inadequacies, gaps and overlaps.... All findings and recommendations will be reported regularly to the general

⁵ President Berman as the Chair of the 1999 Self-Study appointed Murray. Murray had previously been the Chair of prior Self-Studies in 1979 and 1989. As Chair, Murray appointed other members of the committee to write the Self-Study. Professor Gillian Greenhill Hannum, as Chair of the Faculty, was appointed Chair of the 1996 Periodic Review Report for the Middle States Association.

⁶ On one occasion, Professor Posnick of the Dance Department testified that the Provost had to approve the addition of a course because it was being created to add a second course for an Adjunct Professor to teach and would be increasing his compensation. Thus, the Provost had to approve the additional expenditure.

faculty.” Professor Murray described the APC as the “final voice” on curriculum changes. President Berman and Professor Catherine Myers, a former Provost, concurred that the APC controls any curriculum changes and the College administration has never refused to follow these curriculum changes.

Examples of curriculum changes are the addition of new majors and "second areas of strength" (the college's terminology for a minor) or programs. In order to create a new major or "second area of strength", which are interdisciplinary by nature, one or more faculty members inform the Provost of their desire for this curriculum change. The Provost informs the faculty to submit a proposal to the APC. According to Lea Rutmanowitz, Special Assistant to the Provost, the Provost has never refused to allow a faculty member to submit a proposal for a new major or "second area of strength" to the APC. The faculty members submit a proposal to the chair of the APC detailing their idea for a new academic program. After the APC receives the proposal, it has the authority to approve or disapprove this curriculum change. If the proposal concerns a new major being added to the curriculum, the faculty and then ultimately the New York State Education Department must approve it. But, if it is a second area of strength, then the APC's approval is final. After approval, it is placed in the college catalog and the next semester's schedule.

Over the years, faculty members have proposed and the APC and faculty have approved new majors in management and computer science. More recently, new "second areas of strength" added include African Studies⁷, Latin American Studies, Irish Studies, and Holocaust Studies. Professor Irene Whelan, the chair of the History Department, submitted the Irish Studies program proposal, while the Latin American Studies program proposal was submitted by Professor Jose Ignacio Prado, the chair of the Spanish Department, Professor Castenello of the Spanish Department and Professor Ken Pittman of the Political Science

⁷ The faculty also approved African Studies as a new major but the Provost did not submit such to the New York State Education Department based upon its directive that no new majors would be approved.

Department. The Provost initiated the African Studies proposal but it still had to go through the applicable faculty committee for approval and implementation.

Other examples are the addition of various degrees. In the early 1990's, the faculty approved the addition of two degrees, Master of Arts in Writing and Master of Science in Organizational Management and Human Resource Development, which were initially proposed by Sister Dowd, the Dean of Adult and Special Programs. In 1996, the faculty approved a Master of Science in Leadership and Strategic Management, proposed by Don Richards, Associate Dean of Adult and Special Programs. After students requested a Music Theater degree, the music department proposed such to the APC. Thereafter, the APC approved this degree and it will be effective in September 2001.

The faculty also has the authority to eliminate majors. In 1996, the APC and faculty voted to eliminate Classics, Russian, Music Theory and Music History after the State of New York Education Department stated it would not approve any new programs unless some current majors were removed.

A unique feature of an education at the College is the portfolio system.⁸ It was created in 1971 by the faculty after an ad hoc committee of faculty members and students recommended such. In a 1973 College report, the changes were described as follows:

They (the faculty) abolished set numbers of points or credits for graduation; they abandoned distribution requirements. They eliminated the five-course load for students. The cumulative grade point average and credit system was banished from the transcript.

⁸ The portfolio system is a system of planning and assessment of a student's work at the College. In the student's freshman year, the student must provide a study plan outlining the courses to be taken toward their degree, a program evaluation essay, which gives a rationale for the student choice of courses, as well as specific examples of their work and research. Thereafter, the student's portfolio is reviewed in their sophomore and senior years of college. In order to graduate, the student must submit his portfolio for a final written review by the Board of Academic Standards, a six-member faculty committee. The Board of Academic Standards evaluates the portfolio to determine whether the student has completed the required work in his major and "second area of strength", has completed the Distribution Requirements (a minimum number of credits in 5 areas of study -- mathematics and science, social sciences, humanities, languages and fine arts) and has appropriate examples of his writing and research.

In 1988, the APC and the faculty rewrote the portfolio system, which was the subject of a great deal of debate within the faculty.⁹ Eventually, the APC recommended certain changes in the portfolio program; including removing required courses and imposing a set of distribution requirements. The proposed changes were submitted to the faculty for their approval. After consideration, the portfolio program changes were approved. Likewise, in 1996 the APC and faculty approved changes in the distribution requirements, whereas previously in 1988 the faculty had rejected proposed changes. After further debate, the faculty approved the portfolio program changes. These changes were not submitted to the Administration before their implementation, nor did the Administration make any revisions. In the 1990s, the faculty further revised the portfolio system. Again, the administration did not play a role in these revisions.

The College requires the Preceptorial¹⁰ for freshmen students. The Preceptorial is taught in small seminars and each student works closely with a faculty advisor. Five faculty members, including Professors Murray and Myers as co-chairs¹¹, run and control the program. There are approximately 23 faculty members, plus Mary Corrarino, Vice-President/Legal Counsel, who are the preceptors (teachers and advisors of the Preceptorial). In the 1980's, the APC reinvented the Preceptorial. Initially, the Provost formed a summer study group, comprised of five faculty members, to discuss proposed changes. These proposed changes were submitted to the APC, who approved them, and thereafter the changes were made to the Preceptorial. The changes were not submitted to the administration for their approval. The changes consisted of making it a year-long course, requiring the same books to be read in each of the classes, requiring a thesis paper and adding an honors program. Since the 1980's, there have been further changes, made by the five-faculty member committee, in the Preceptorial. The major changes

⁹ The initial idea of a revision of the portfolio system originated with a summer study group of faculty members chosen by the Provost.

¹⁰ The Preceptorial is a two-semester required course, which is designed as an introduction to college-level work and is interdisciplinary in nature by stressing the importance of humanities, arts, social sciences and natural sciences.

¹¹ Provost Losada appointed Professors Murray and Myers as co-chairs.

were to disallow adjunct faculty from teaching the course and add more sections in order for the classes to be smaller. In the spring of 1999, the preceptors voted to eliminate the honors section of the Preceptorial program. Then, President Berman stated it was too late to eliminate such for the following school year because it had been offered as a recruitment incentive for incoming honor students and was already published in the catalog. Although the record is not clear whether the decision was based on a vote or on consensus, the preceptors agreed to its retention.

Another curriculum change, which went through the APC, concerned a new grading system. About 1990, the APC and the faculty discontinued the pass/fail grading system and implemented the conventional “A-F” grading system. The Provost, Catherine Myers, opposed this change but it was implemented and has continued to date. The only role, which College administration officials have in grading, is the Dean of Studies must approve a professor granting a student an “Incomplete”. Additionally, the Dean is the individual who notifies a student that their grades are too poor to continue as a student.

In 1998, an Honors Program was implemented at the College at the initiation of Gabrielle Wickert, the Dean of Studies. As with other curriculum changes, it was submitted to the APC, which drastically amended it before its approval. Thereafter, it was submitted to the faculty, who also approved it. Three faculty members and the Dean of Studies direct it. There have been other honors programs implemented by the faculty.

At other times, the President or Provost have proposed curriculum changes, which have not been implemented by the APC and, thus, have not become effective. Specifically, in 1983, the Provost proposed the addition of a communication major but the faculty rejected it. In the mid-1990’s, the President negotiated Articulation Agreements with a group of State of New York junior colleges, whereby graduates of the junior colleges would receive 60 hours of credit upon admission to the College without any review of the particular courses taken. The APC and the faculty rejected these agreements and insisted on continuation of the policy whereby the faculty

would determine the number of credits, which would transfer.¹² On a couple of recent occasions, the Dean and the Provost “signed off” on transfer credits, instead of the biology or chemistry departments. Professor Morehouse protested this to the APC, where the matter is currently pending. More recently, the President requested the addition of an ethics component to the curriculum but the APC has not approved of this addition.¹³

Occasionally, the faculty has made curriculum changes without going through the APC. Specifically, in 1991, changes were made in writing requirements for the writing program by the chair of the English department.

Although the APC and/or faculty are supposed to approve all curriculum changes, the Petitioner cited four instances wherein the Administration initiated curriculum changes. In 1995 President Berman created an “intersession”, a three-week semester in between the fall and winter semesters.¹⁴ Since its implementation, the faculty has not sought its elimination. The Employer asserts the creation of the intersession does not “constitute the development of a new academic program”; rather, it is a decision on the best use of its facilities and resources. Furthermore, it is undisputed that once the intersession was agreed upon, the faculty determined what courses would be offered, and by which professors. In 2000 the Administration added a New York City semester program without faculty input or approval. The record evidence, as demonstrated through Sister Causey’s testimony and written documentation, reflects that the Provost originated the idea of a New York City program and thereafter sought the input of the faculty. After faculty and administrators met, they made a proposal to the APC. Thereafter, the APC agreed with the program and it was implemented in 2001.

¹² There continues to be an Articulation Agreement with a college in Japan, whereby visiting Japanese students’ credits are transferable, but the faculty determines the transferable credit. Berman testified this was negotiated by the Society of Sacred Heart.

¹³ Also, in 2000, the Provost suggested the addition of a CPA preparatory program and submitted it to the Economics, Finance and Management Department for their review and submission to the APC. The Department has questioned the proposal and, to date, it has not been submitted to the APC.

¹⁴ Similarly, the Provost arranged some “distance learning” courses to be offered.

The administration, through the Dean of Adult and Special Programs, determines which regular courses are to be offered in the summer session but the professors continue to have authority over all other aspects of the curriculum. Also in 1995, a course entitled "Logic and Critical Thinking" was taught by adjunct Professor Emerson Black for the Masters of Professional Studies. The administration cross-listed¹⁵ the course with the Philosophy Department, although Professor Lucas, chair of the department, had not approved such a cross listing.¹⁶ A final instance concerns the "study abroad" program, which the Petitioner asserts the President drastically reduced. The College asserts the program was increased. The evidence for the parties' assertions is inconclusive.

As previously mentioned, the Board of Academic Standards is another faculty committee. The faculty elects its six members with the Dean and another administrator as ex-officio members. This Board reviews students' work toward graduation, determines who may graduate, approves accelerated degree programs and decides the recipients of various honors. The Board's decision on graduation is final and may not be overruled by the Administration.

The Faculty Status Committee recommends the reappointment, promotion and grant of tenure to professors. The committee consists of five tenured faculty members, who are chosen by the faculty. The initial step is for the involved department to make its recommendation concerning a professor's reappointment, promotion or grant of tenure. This recommendation is presented to the Faculty Status Committee, which then makes its own recommendation after a review of the professor's file. The Faculty Status Committee usually follows the recommendation of the department. The recommendation of the Faculty Status Committee is then presented to the Provost. The Provost also reviews the professor's file and makes his recommendation. Thereafter, the Provost and the Faculty Status Committee meet to discuss

¹⁵ The cross-listing of a course means that students are eligible for academic credit in each of the departments, which are cross-listed.

¹⁶ The normal procedure is for the professor to receive permission to cross-list a course from the other professor and department.

their recommendations. If they do not agree on their recommendation, then they try to resolve their differences. Myers, the former Provost, testified she usually followed the respective department's recommendation. The recommendations of the Faculty Status Committee and the Provost are submitted to the President, who independently reviews the professor's file. Then, the President, Provost and Faculty Status Committee meet to discuss the professor's reappointment, promotion or grant of tenure. President Berman testified that during these meetings he has changed his mind on a professor's status. In order for a grant of tenure to be made, it has to be approved by the Board of Trustees. The Board of Trustees has never rejected a recommendation.

In the period of 1990 through the spring of 1995, under the tenure of President Marcia Savage, the issue of tenure was considered 22 times by the Faculty Status Committee and the President. Both parties agreed on 20 of those 22 decisions, and once the Committee was evenly divided. During the same time period, the parties agreed on 23 of the 26 promotion decisions¹⁷ and 59 of the 61 reappointment decisions¹⁸.

Between the fall of 1995, when Berman became President, and the present, approximately 94 decisions have been made on a professor's reappointment, promotion or grant of tenure. The parties agreed on 9 of the 10 tenure decisions. Concerning promotions and reappointments, the parties agreed on 36 of 44¹⁹ and 39 of 40, respectively. Berman testified that he granted promotion or reappointment to Professors Santucci, Jones and Bavar when the Faculty Status Committee opposed such or made no recommendation. Berman refused to promote or reappoint Professors DeCorso, Gardella, Monte, Pardes, Carsage and Blake when the Faculty Status Committee recommended their promotion or reappointment.

¹⁷ On two other occasions, the Committee was deadlocked on whether a faculty member should be promoted.

¹⁸ On 6 occasions, both parties desired reappointment but disagreed on whether it would be a 1 or 2 year term.

¹⁹ Of the 8 occasions wherein the parties disagreed, the Committee split 3 to 2 on 4 occasions.

Berman stated he never disagreed with the Faculty Status Committee when it made a unanimous recommendation.

The faculty was involved in the search for a new Dean for the School of Education. The search committee was comprised of four faculty members, including the chair, Professor Eisenhower and Professor Joan Weinrich from the School of Education, and one administration official and one student. Furthermore, the faculty of the School of Education interviewed each of the applicants and provided their input in the selection process. Ultimately, the search committee recommended Kathryn Padovano and the President agreed.

In 1999, the administration discharged one administration official, Father Flynn, who was the Director of Campus Ministry, over the objections of the faculty. This occurred when the administration integrated the Campus Ministry with the Ducien Center for Religion and Social Justice and chose Sister Margaret Causey, a member of the Society of Sacred Heart, as its Director. Since 1999, the religious activities and staffing have expanded. Thus, Father Flynn's discharge did not result in the end of the Campus Ministry.

The faculty formed the Faculty Compensation Committee in 1997 through a new by-law. It took over matters, which previously the Faculty Status Committee had handled. In forming this committee through a new bylaw, the faculty stated it did not want to "change the relationship of the way that the College was governed". Initially, the faculty presented the proposal for this committee to the Board of Trustees and described the new committee's function as "to negotiate regarding compensation issues".²⁰ The Board of Trustees objected to the use of the word "negotiate" while continuing the "shared governance" concept. Thereafter, the faculty revised the bylaw for the Compensation Committee by removing the word, "negotiate", and endorsing

²⁰ In 1983, a by-law was passed which recognized a Manhattanville Faculty Association to "negotiate" on behalf of the faculty. This by-law was struck in 1992 due to the fact that the Manhattanville Faculty Association had ceased to exist.

the continuation of “shared governance”. Specifically, the 1997 by-law states the Committee “shall hold discussions with the Administration regarding compensation issues, including salary and benefits, following guidelines approved by the faculty.” Thereafter in 1997, the faculty chose Professors Peter Gardella, Randy Williams and Cecilia Winters for the Faculty Compensation Committee. The administration’s participants were President Berman, Sebastian Persico, Vice-President for Finance and Administration, and Provost Losada. The Faculty Compensation Committee held a number of meetings in the period of 1997-1998. The faculty sought higher increases than the administration desired. The participants surveyed a number of comparable colleges to determine their faculty salaries. The administration desired an increase in the faculty workload in return for the salary increases and said one must be tied to the other. Eventually, the Faculty Compensation Committee recommended the following: increase the faculty salaries by seven percent per year for three years, increase the professors’ workloads from six courses a year in 1998-1999 to seven courses a year in 1999-2000 to eight courses a year in 2000-2001 and thereafter, and add 11 professors over a three-year period. Thereafter, the faculty and the Board of Trustees approved the new compensation plan, workload and hiring. The plan was implemented on March 25, 1998, retroactive to January 1998. The Faculty Compensation Committee also sought a change in the manner in which course equivalencies are granted for such activities as department chair or director of a theatrical or musical performance. The Committee and faculty sought to change the language by which course equivalencies would be granted from “under exceptional circumstances on a limited basis” to “a reasonable basis”. The Board of Trustees rejected this proposed change.²¹ The Faculty Compensation Committee and the faculty approved part-time faculty appointments but the Board of Trustees also rejected this change.

²¹ Even under the current language, 2/3 of the faculty are teaching less than eight courses per year due to course equivalencies.

In 1999 and 2000, the Faculty Compensation Committee met with the administration concerning faculty salaries, more full-time faculty, greater stipends for chairs and course load reduction. The Committee proposed a salary increase if the 8-course load remained or a 7-course load with little to no salary increases. The parties eventually reached agreement on stipends -- \$1500 for large departments and \$500 for small departments. The parties did not reach an agreement on a new salary plan; so on January 4, 2001, President Berman implemented one. Agreement was reached as to the need for additional faculty over the next five years and the administration has been implementing this through the hiring of at least four new faculty positions for 2001.

On a few matters relating to the faculty's benefits and working conditions, the administration has acted without faculty input. In 1993, the administration unilaterally increased the workload from 3 to 4 courses per semester due to extreme financial difficulties but returned it to 3 courses a couple of years later after the financial crisis had ceased. In the yearly contracts signed by non-tenured faculty between 1995 and 1997, the administration unilaterally changed the language concerning office hours.

The faculty is involved in the College's yearly budget process. Initially, Vice-President Persico provides the department chairs with documentation from the last three years of their spending and requests a budget submission for the year. Persico testified that typically their "wish list" is 10 percent higher than the revenue budget. Thus, Persico requests the Faculty Budget Committee, which consists of three faculty members chosen by the Faculty, to prioritize the budget. After the Faculty Budget Committee has provided their priorities, the budget is submitted to the President and Board of Trustees for approval. The Faculty Budget Committee has impacted the College's budget. Specifically, it recently raised concerns about the amount of money budgeted for new equipment, the four percent tuition increase across the board and the level of capital spending. Due to these concerns, the Board of Trustees agreed with the Faculty Budget Committee to increase the new equipment budget from \$21,000 to \$121,000 and to not

raise tuition for two graduate programs. The Faculty Budget Committee also has unlimited authority to request budget information from the College and the record evidence reflects the College has never refused to supply any information.

The faculty also has played a significant role in whether capital expenditures are made. As an example, in the late 1990s, the President proposed to build a new hockey rink, which would have been paid for by the New York Rangers, a National Hockey League team. The faculty strenuously objected to the building of a new hockey rink, which would have been the first new building on campus in 30 years. After the faculty's objections and other difficulties with the proposal, the President abandoned the idea of a new hockey rink.

The Faculty Steering Committee consists of 11 faculty members, 4 administrators, who do not have voting rights, and 2 students. The Faculty Steering Committee is responsible for coordinating the work of all the faculty committees as well as making recommendations to the faculty concerning changes in the faculty by-laws.

Another faculty committee is the Admissions Committee, which consists of three faculty members and three non-voting ex officio administrators. The committee's duty is to "advise the Dean of Admissions and the President on policy as approved by the faculty regarding recruitment and admission of all students." Beyond the Admissions Committee, the faculty's role, with regard to admissions, varies from department to department. In the Departments of Art, Dance and Music, there are auditions of applicants/prospective students, which are judged by faculty, and which play a vital role in whether those prospective students are admitted. In the School of Education, students apply for admission in their sophomore year. In order to be admitted, a student must fill out an application, write an essay and submit their grades. Professors in the School of Education determine which students are accepted, rejected or provisionally accepted. However, the faculty in other departments does not play a role in whether prospective students are admitted. Also, the faculty does not play any role in the award of scholarships to students.

President Berman has created a number of ad hoc committees, which are not set forth in the College's bylaws. Specifically, these committees are Technology, Self-Study, Strategic Planning, Campus Life, Summer, Web-Based Registration, 504 (Rehabilitation Act) and Enrollment Management. These committees do not have the authority to change academic policy, curriculum or any other policies of the College. Rather, each of the committees' jurisdictions is limited. Berman appoints the head of these committees and suggests various faculties to be members. The head of each committee has the authority to disapprove of any of the President's suggestions for committee members.

The Technology Committee was created about 1995 with Professor Murray as the head. Its purpose was to modernize the campus by installing computers, e-mail and voice mail.

In the past five years, there have been two Self-Study Committees. These committees were created to submit reports to the Middle States Association of Colleges. The 1996 Self-Study Committee was chaired by Professor Gillian Greenhill-Hannum, who was Chair of the Faculty at that time and chosen by President Berman because of her role as Chair of the Faculty. Professor Murray, who also was appointed by President Berman, chaired the 1999 Self-Study Committee.

The Strategic Planning Committee was created in about 2000 by Berman to draft a vision or strategic plan for the future on how to attract and retain students and remain competitive with other similar colleges. The committee consisted of Professor Myers, Chair of the Faculty at that time, Professor Murray, Provost Losada and Jose Flores, Director of Admissions. A consultant, Sam Davis, was hired as a facilitator for the strategic plan. A draft of the plan was discussed at faculty meetings, where faculty comment and input were sought. President Berman testified faculty input was important "because, as partners, we can't go forward unless we have some real buy-in on these issues". The Strategic Planning Committee made recommendations to the faculty, some of which involved academic matters. Those

recommendations concerning academic matters were submitted to the APC for their approval and their approval was not forthcoming. The recommendations were not followed.

The Campus Life Committee was revived by Berman to discuss issues of parking, lighting and security. The co-chairs of the committee were Vice-President Mary Corrarino and Professor David Dwight Eisenhower. The co-chairs recommended six faculty members to serve on this committee and Berman accepted their recommendations. This committee had no authority except to issue a report on its findings on these issues.

Berman created the Summer Committee in about 1995 in order to identify alternative uses of the College in the summer, which would raise additional revenue. Alternative uses identified and implemented include the “Connect” program, to build a better relationship between the Westchester Police Department and minority children, a summer camp, and a senior tennis circuit tournament. The Summer Committee does not have any authority over academic matters.

The Web-Based Registration Committee was created by Berman to change the registration system from the ritual of waiting in line process to a web-based process. This committee consists of faculty members, including Professor Murray, as well as the Provost.

Berman also created the 504 (Rehabilitation Act) Committee in order to make sure the College is fully accessible to the disabled. The committee consists of faculty members and has no authority over academic issues.

The Enrollment Management Committee was created by Berman to deal with the issue of retention of students. This committee deals with such issues as activities for students on campus and other aspects of a resident’s life on campus. The committee has two faculty members and one administration official and has no authority over academic issues.

Additionally, an ad hoc committee was formed by President Berman to search for a new Dean of the School of Education. Professor Eisenhower was chosen to chair the committee

and he chose the other members, including four faculty members, one administrator and two students.

The College asserts even if the professors are not managerial employees, the chairs and directors of the departments and programs are supervisors within the meaning of Section 2(11) of the Act. The principal indicia of supervisory status concern the hiring of professors and adjunct professors. The Employer asserts such hiring is evidence of both supervisory and managerial status.

Most of the chairs of the various departments signed a petition in 1999, which stated they have authority in “hiring and oversight of adjuncts”. The College also introduced testimony concerning the chairs’ involvement in evaluating and retaining adjunct professors.²²

The record evidence, as more fully developed below, reflects the faculty effectively hires professors and adjunct professors. The initial step in the hiring process of a professor is the placement of an ad in scholarly journals and other similar publications. The department faculty drafts the advertisement setting forth the necessary criteria and then the College’s General Counsel reviews it from a legal perspective. Thereafter, the department faculty reviews the applicants’ resumes or vitae and chooses several to interview. The department faculty interviews the applicants and then decides whom they want to hire. At this point, the Provost is informed of their choice. The Provost has an interview with the candidate wherein the parties agree on compensation and other terms and conditions of employment.

Professor Lawson Bowling and Professor Whelan of the History Department testified Assistant Professor of History Colin Morris was hired in 1999. Both testified that each of them reviewed the applicants’ resumes, interviewed Morris and several other candidates and recommended Morris’ hiring to the Provost. Thereafter, Morris was hired. The same procedure was utilized for the hiring of another Assistant Professor of History, Mohamed Mbodj, in 1999.

²² The Petitioner asserts most of the chairs had not seen a College document setting forth their duties but the record evidence reflected these chairs concurred that the document accurately stated their duties.

Professor Morris, the Director of American Studies, recommended an adjunct professor to teach in the fall of 2001 and the Provost agreed. Professor Morris is the only professor in the American Studies program, which cross-lists its courses with a number of other departments, including History, Political Science, Sociology, Art History, Music, World Religions and English.

Professor Bowling testified he was chair of the History Department for over five years in the 1990s. As chair of the History Department, Bowling testified he interviewed and recommended for hire three or four adjunct professors. Professor Whelan, who is the current chair of the History Department and Director of the Irish Studies program, recruited and recommended for hire two adjunct professors. Bowling and Whelan stated the administration had not vetoed the hiring of any adjunct professors. Neither testified whether other professors in the History Department were involved in the hiring of the adjunct professors.

Professor Eisenhower of the Sociology Department testified that when the department sought an additional professor, each of the three department professors, collectively wrote an ad, reviewed the resumes of the applicants, interviewed the top candidates and agreed as a department to hire Eric Slatter as an Assistant Professor. Afterwards, the Provost gave his approval of the hiring. Eisenhower testified he recruited three individuals as adjunct professors although he was not chair of the Sociology Department at the time he recruited each of them. Professor Murray, former chair of the Sociology Department and current chair of the Communications Department, testified about hiring adjunct and full-time professors. Specifically, Murray testified he recruited, interviewed and hired several adjunct professors. Concerning the hiring of full-time faculty, Murray stated the department faculty was included in this process and the Provost offered employment to those individuals that the department desired to hire.

Professor Gerard Kiernan, chair of the Mathematics and Computer Science Department, testified the entire department was involved in the hiring of adjunct professors and full-time professors. Specifically, Professor Kiernan stated the department faculty placed ads in journals,

jointly interviewed candidates and then made a department recommendation to the Provost, which has always been followed.

Michael Posnick, the director of the Dance and Theatre Department for 7 years, testified he had been involved in the hiring process of over 10 adjunct professors, many of whom he, in conjunction with another professor, recruited, interviewed and recommended for hire. Professor Posnick stated he also recruited and hired a technical director, an administrative assistant and student helpers as well as fired the former administrative assistant. Posnick stated the Provost has never vetoed any of these decisions.

Concerning the hiring of new full-time professors, Professor Randolph Williams, chair of the Art Studio Department, testified it was a department's choice, not the chair's choice. His department has hired two professors during his tenure. Williams also said he had hired about 13 adjunct professors and located the individuals through the "art community" or a current adjunct professor. On some occasions, other full-time faculty took an active role in the process.

Professor Greenhill-Hannum, chair of the Art History Department, testified when adjunct professors were hired in her department that she and the only other full-time professor were both involved in the process, which included locating a potential candidate²³, interviewing the candidate and offering him employment. Greenhill-Hannum stated the Provost has never rejected the department's candidate. She said she also hired students to file slides.

Professor Anthony LaMagra, chair of the Music Department since 1971 and director of music since 1975, testified his department currently has approximately 20 adjunct professors, 17 of whom are specialists in various instruments or voice. LaMagra stated most of the adjunct professors are located through "word-of-mouth". The Music Department interviews the prospective adjunct professors and thereafter makes a recommendation to the Provost.

²³ Another professor in Art History, Laura Kaufman, testified President Berman requested the department to offer an adjunct professor position to former College president Barbara Debs but the department declined.

LaMagra stated the department had recommended the hiring of 30 adjunct professors who were hired.²⁴

Professor Sheila Morehouse, chair of the Chemistry Department, has held that position for over 10 years. The only other full-time faculty is Frank Bellevue, an Associate Professor. Morehouse stated she and Professor Bellevue recommended hiring Dr. Gerald Spielholtz in 2000 as an adjunct professor and the Provost hired him. Morehouse said the Provost had never rejected an adjunct professor recommended for hire but had failed to allocate sufficient salary to a few, which caused them to reject the job. Morehouse said she had hired four students to help in the lab.

Professor Prado, chair of the Spanish Department and director of the Latin American Studies program, stated she had been the chair for five years during which time she had interviewed and recommended four individuals as adjunct professors. Each was hired by the Provost. The Spanish Department consists of Professor Prado and one other full-time professor.

Dean Wickert, the chair of the German Department since 1976, recruited, interviewed and hired an adjunct professor in 1997.

Professor Claude Roquin, chair of the French Department for many years, stated he and Professor Alexander Hart, chair of the Italian Department, interviewed and recommended for hire an individual, who was hired and then fired after his one-year review by the Faculty Status Committee. Roquin said that on one occasion Adjunct Professor Jacqueline Sareil and he located and hired Adjunct Professor Monique Selinger when a new professor was needed during a semester. Roquin also testified the Provost fired another adjunct professor for changing the class schedule during the semester without permission.

²⁴ LaMagra also testified the Music Department has an administrative assistant and that he assigns the assistant her work and evaluates her performance.

Professor Peter Gardella, chair of the World Religions Department and director of the Holocaust Studies program for many years, testified he hired Sister Causey as a full-time professor at the urging of President Berman in order to try and re-establish a connection with the Society of Sacred Heart. Gardella stated he and the other two department professors interviewed Sister Causey and wholeheartedly recommended her hiring. Gardella said President Berman hired one adjunct professor, Rabbi Norton Shargel, to teach “Judaism” rather than Miriam Klein-Shapiro, whom Gardella had offered employment.²⁵ Also, Gardella testified Berman offered Sheldon Grebstein a Visiting Scholar position in 1997 before consulting him although afterwards he (Gardella) concurred with the decision. Furthermore, Berman urged the hiring of Professor Emeritus Mary Clark, who had been forced to retire due to her age, as an adjunct professor and Gardella hired Professor Clark. Gardella said several other adjunct professors were hired to teach various courses although they were hired under a variety of circumstances in which Gardella did not personally interview or meet them beforehand.

Professor Anthony Santucci, chair of the Psychology Department, stated he had been involved in the hiring of several assistant professors and adjunct professors. Santucci stated the same basic procedure was followed when the last three assistant professors were hired. The professors in the Psychology Department reviewed the applicants’ vitae, determined whom to interview, interviewed the top candidates, made a departmental recommendation to hire a candidate and the Provost followed the recommendation.²⁶ As for hiring adjunct professors, Santucci testified he initially reviewed the candidates’ curriculum vitae, spoke with colleagues at other colleges, and with the assistance of other professors, interviewed candidates. Thereafter the professors jointly recommended candidates to the Provost. All of their recommendations were followed.

²⁵ Eventually, Klein-Shapiro was offered an opportunity to teach in the summer.

²⁶ The Petitioner’s assertion that the Provost made the decision, independent of the department, is contrary to the record evidence.

Professor William Perkins, chair of the Department of Economics, Finance and Management, interviewed and recommended two individuals be hired as adjunct professors. Thereafter, the Provost hired them.

Professor Myers testified the English Department as a whole decided whom to hire as a full-time faculty member even when she was Provost and a faculty member of the department. Even though she favored one applicant, the English Department chose another candidate. Professor Van Hartman of the English Department stated he had recommended the hiring of one adjunct professor after personally interviewing him when he (Hartman) was chair. Thereafter, he was hired without anyone else interviewing him. Hartman said he also hired some preceptors when he was chair of the Preceptorial program. Professor Hartman stated that when some of the new preceptors did not do well, he did not retain them as preceptors.²⁷

Professor Zhang Chen, chair of the Physics Department wherein she is the only full-time professor, testified she had recommended one adjunct professor for hire and the Provost had hired him.

Raymond Langley, chair of the Philosophy Department, said one professor, Billy Joe Lucas, had been hired during his tenure. Langley stated that at the time of Lucas' hire, in the late 1980s, he (Langley) was the only department member. Thus, Langley placed the employment ad, chose the candidates to interview and recommended Lucas. The last adjunct professor hired was Louisa Dowling in about 1996. Although Langley was unclear as to how Dowling became a candidate, he recommended to the Provost that she be hired.

Theresa Kelleher, chair of the Asian Studies program and Associate Professor of World Religions, stated that as the only full-time professor in the program, she had interviewed and recommended for hire two individuals as adjunct professors. Each individual was hired.

²⁷ Although the preceptors were employed elsewhere by the University, they ceased to perform as preceptors.

Furthermore, Kelleher and Professor Kaufman interviewed and recommended Virginia Skord for hire as a full-time Asian Studies professor. Skord was thereafter hired but later resigned. Professor Anne Marie Bettica, chair of the Biology Department for a number of years, testified her department did not currently have any adjunct professors. However, previously when it did, she had recommended them for hire.

Professor Janet Simon, currently the Director of Curriculum in the School of Education and the former Dean of the School, testified about the School of Education. It is the only curriculum with its own School and its own Dean, Sylvia Blake, and Associate Dean, Susan Jacobs. The School has seven professors, six of whom are directors of a program. As Director, Simon keeps files of potential adjunct professors. About once or twice a year Simon reviews these files, interviews candidates and recommends candidates for hire to Dean Blake. Dean Blake always follows the recommendation. Concerning the hiring of full-time faculty, Simon said the whole school participated and made a recommendation. Simon testified in the late 1980's, before Education was a separate school, the Provost hired three professors against the wishes of the Education faculty. Since then, the Provost or Dean has hired only those individuals recommended by the faculty.

Professor Laurence Krute, director of the Second Languages program in the School of Education, stated that as the only faculty member in the program, he had recommended to Dean Blake the hiring of three individuals as adjunct professors. Professor Rebecca Rich, Director of the Special Education program, stated she had recruited, interviewed and recommended for hire several adjunct professors. The Dean approved all of these recommendations.

A situation occurred in 1984 wherein the administration acted without a department's approval. Specifically, President Barbara Debs converted Adjunct Professor Janina Kibort-Chiaroni to regular part-time professor in the Art History Department. Prior to this, Adjunct Professor Kibort-Chiaroni had taught two courses a semester in the Art History Department. No

one in the Art History Department was consulted about this matter. Later in 1991, the Art History Department removed Kibort-Chiaroni as an adjunct professor. She was due for tenure review and was rejected because she had never completed her Ph.D, a requirement for tenure. At this same time, Kibort-Chiaroni was hired as the Director of Studies Abroad, a non-faculty appointment, and thereafter taught a preceptorial section, through her Director of Studies Abroad position, until her resignation in 1993. Professor Laura Kaufman, a witness for Petitioner, testified Kibort-Chiaroni taught a course entitled Russian Art History. Kaufman stated this course had been taught previously in the Art History Department, through the Russian Studies program in the fall of 1991. The College presented the College catalogs for the fall of 1991 and spring of 1992, which do not reflect Kibort-Chiaroni teaching a Russian Art History course or any other course. Furthermore, Professor Myers testified that the Director of the Russian studies program, Tatiana Whittaker, did not want Kibort-Chiaroni teaching in the Russian studies program; thus, Whittaker would not have agreed to allow Kibort-Chiaroni to teach in the program.

The record evidence, as established through many professors' testimony, reflected it was the chair's function to evaluate adjunct professors. This usually consisted of reading the student evaluations of the adjunct professors. The professors testified that unless some particular problem occurred, each adjunct professor was retained from year to year.

The record evidence reflected several instances where adjunct professors were not retained. According to Professors Whelan and Bowling, many students complained that an Adjunct Professor was abusive to them and these complaints were also made to Dean Wickert. Moreover, Professor Whelan testified the Adjunct Professor refused to teach a course that she had been scheduled to teach. According to Whelan, the History Department decided as a group to no longer schedule her to teach any courses in their department. Professor Murray testified he decided not to retain an adjunct professor based upon poor evaluations. Professor Posnick testified he decided not to "ask an adjunct professor back" 4 or 5 times due to his evaluation of

their performance. Professor Williams testified the Studio Art Department professors decided “not to invite back” an adjunct professor in about 1987 because he could not remain current on new computer advancements in graphic design. Professor LaMagra stated the department did not retain one Adjunct Professor after he stopped showing up for class on a regular basis.²⁸ The Provost made the decision not to retain one adjunct professor in the Music Department after a student alleged he had sexually harassed her.

Professor Rich, Director of the Special Education program, stated she had discussed her recommendation, that certain adjunct professors not be retained, with the Dean on three or four occasions and the Dean agreed on each occasion. Professor Morehouse testified her department decided not to retain two adjunct professors due to problems with their teaching, attendance and grading as well as students’ complaints. The Provost did not overrule these decisions. Professor Kiernan stated that in about 1994 an adjunct professor was not asked to return after some student complaints, which the adjunct professor did not want to resolve. Professor Kelleher stated the Provost told her to not retain an adjunct professor and she complied. Similarly, according to Professor Simon, Dean Blake decided not to rehire an adjunct professor after a student complained about the adjunct professor’s “attitude”. Wickert stated that, before her tenure as Dean, she had dismissed two adjunct professors for inappropriate conduct and lack of ability.

ANALYSIS

The primary issue is whether the full-time faculty of the College are managerial employees under the Supreme Court’s holding in ***NLRB v. Yeshiva University***. Managerial

²⁸ LaMagra also testified the Music Department had requested the Adjunct Professor not be retained. The President agreed to pay the Adjunct Professor two years of salary without teaching. This was apparently due to the fact that the Adjunct Professor had a contract with the College to provide other professional services.

employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of the employer”. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). If they are managerial employees, then the petitioned-for unit is inappropriate because managerial employees are excluded from coverage of the Act. See *NLRB v. Texttron, Inc.*, 416 U.S. 267 (1974).

In *Yeshiva*, the Supreme Court held:

[The faculty's] authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grade policies, and matriculation standards. They effectively decide which students will be admitted, retained and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these are. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and customers who will be served.

103 LRRM 2526, at 2532.

The Supreme Court described the pertinent facts as follows:

The faculty participates in University-wide governance through its representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the dean of the affected school or to the president. Such recommendations are purely advisory.

[M]ost of the schools also have faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiate with administrators concerning salary and conditions of employment. Through these meetings and committees, the faculty at each school effectively determines its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school makes recommendations to the dean or director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the dean or director, the overwhelming majority of faculty recommendations are implemented.... In addition, some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels and in one case the location of a school.

Id. at 2528-29.

Concerning the administration having the “final decision”, the Supreme Court said, “the fact that the administration holds a rarely exercised veto power does not diminish the faculty’s effective power in policymaking and implementation.... [T]he relevant consideration is effective recommendation or control rather than final authority.” *Id.* at 2531, fn. 17.

Since the Supreme Court’s decision in ***NLRB v. Yeshiva University***, the Board has issued approximately 20 decisions concerning whether university faculty are managerial employees.

In ***Lewis & Clark College***, 300 NLRB 155 (1990), the Board concluded the undergraduate faculty members were managerial employees. Specifically, in academics, faculty members individually determined their teaching methods, research projects and students’ grades. Moreover, teaching assignments for particular courses were decided through faculty consensus at the department level. There were faculty committees on which faculty members were elected by faculty members to serve. The faculty constituted a majority on each of the committees although some administrative officials served in an ex officio capacity. The committees were curriculum, admissions and financial aid policy, faculty personnel advisory, faculty council and review board. The curriculum committee had full authority concerning proposals over new college degrees and their requirements, establishment of new departments or educational programs, academic calendars and schedules, and all courses, including additions, deletions and alterations. In order for students to graduate, the department chair signed a form affirming the students had fulfilled the graduation requirements. This was done only after the department faculty had approved a list of graduating students. Concerning admissions, the faculty recommended standards, which had never been rejected by the president. However, the faculty was not involved in the actual selection of applicants for the college. *Id.* at 156-57.

In non-academic matters, the faculty was involved in filling faculty positions. Specifically, the department chair established a search committee of faculty members, including the chair;

this committee reviewed the applicants' resumes and scheduled interviews with the top-ranked applicants. The search committee, the dean, the provost and the president interviewed the applicants and thereafter the committee made a recommendation to the three administration officials. In a three-year period, all but one of the search committee's recommendations was followed by the administration. Concerning promotion and tenure, the faculty review board made recommendations to the dean and thereafter the recommendations were forwarded to the provost and president. For a ten-year period, the administration followed 65 of the 67 faculty review board's recommendations for promotion and 52 of the 57 faculty review board's tenure recommendations. *Id.* at 157.

Concerning budget matters, the faculty did not make recommendations. The Board of Trustees established several policy-making committees for long-range planning. One such committee, the mission planning committee, reviewed the college's mission and purpose and issued its recommendations along with items referred to the faculty curriculum committee for evaluation. The Task Force on Governance was established by the Board of Trustees to "revise, review, and develop new governing documents and procedures for the entire college". The Board of Trustees stated this task force's proposals would only be presented to the faculty for an advisory vote, rather than for approval or rejection. *Id.* at 158.

The Board in finding the undergraduate faculty in ***Lewis & Clark College*** to be managerial employees, stated:

An organization can have several layers of policy-making and, hence, several layers of managerial employees. There is, therefore, nothing inconsistent with the faculty members having authority over one level of policy (e.g., academics), and administration (including the Board of Trustees), having control over another (e.g., financial viability and long-term planning).... But, even as to those areas in which the administration has exercised its own managerial decision-making authority, the faculty performs high-level implementation of those decisions.

[The college's] hierarchy is similar to the one in ***Yeshiva*** where there was a board of trustees, a president, a vice-president for academic affairs, and the dean or directors of the various schools.

Nearly all recommendations on academic matters are routinely approved by the administrative hierarchy. Although some faculty recommendations are independently reviewed as they travel up the administrative hierarchy, this occurs predominantly with non-academic rather than academic decisions.

Id. at 162-63.

In *Livingstone College*, 286 NLRB 1308 (1987) in which faculty were found to be managerial, the Board summarized the faculty's authority and its holding as follows:

[T]he faculty exercise almost plenary control over curriculum and academic policy, particularly by virtue of the facultywide vote over proposals and recommendations made by the various standing committees. Significantly, the curriculum catalog committee must approve all curriculum changes. Neither the dean nor the president can make changes in academic policy without presenting the changes to this committee. Faculty proposals regarding the establishment of degree programs have been implemented. The faculty has established major fields of study, modified course requirements, added and deleted course offerings, and set degree requirements, without opposition from the administration. At the departmental level, the faculty and the department chairpersons determine course content, course descriptions, and course scheduling, with the academic dean serving primarily to coordinate the schedules. The faculty effectively controls and sets standards for expulsion and retention, attendance for upperclassmen, matriculation, and graduation requirements. Furthermore, the faculty has significant input into the awarding of scholarships and honors. The majority of recommendations made by the committees and approved by the faculty are implemented without prior approval from the administration....

... We note, however, that the faculty has virtually no input into the budget process, tenure decisions, and setting of tuition and that only the division and department heads have authority in non-academic matters such as hiring, firing, promotion, and salary increases. Nevertheless, we do not believe that lack of participation in these matters precludes a finding that the faculty are managerial employees....

[T]he Supreme Court did not rely primarily on faculty authority in matters of hiring and firing and related areas in finding Yeshiva faculty to be managerial employees. As stated by the Supreme Court in *Yeshiva*, "the business of a university is education and vitality of a university ultimately depends on its academic policies." *Yeshiva*, supra at 647. We have found that faculty members at Livingston College have substantial authority in formulating and effectuating policies in academic areas. Given that the business of a university is education, it is the faculty members' participation in formulating academic policy that aligns their interest with that of management and warrants our finding them to be managerial employees....

Id. at 1313-14.

In *University of Dubuque*, 289 NLRB 349 (1988), the Board discussed the necessity of meeting all of the factors set forth in *Yeshiva*. Specifically, the Board stated:

[T]here is no indication in *Yeshiva* that the Court intended its holding to reach only institutions with faculties having as much or nearly as much input as the Yeshiva faculty. In fact, the implication is quite the opposite. Thus, the Court engaged in a lengthy discourse on the nature of institutions of higher learning in general... [T]he court clearly focused on the faculty's role in academic matters although other factors were also

considered. The Court made numerous statements about institutions of higher learning that, going beyond the facts of **Yeshiva** itself, were general in nature. [S]ignificantly, although the Court found that Yeshiva's faculty's authority in academic matters was absolute, it expressly found absolute authority is not a prerequisite for managerial authority.

....
...[W]e do not believe that the issue of managerial status can properly be decided simply by counting and comparing the number of areas in which faculty at a given institution have input with number of such areas found in **Yeshiva**. Although this approach may measure the scope of areas in which faculty members exercise influence, it fails to measure the extent of that influence and consequently fails to take into account the many different combinations and permutations of influence that render each academic body unique. Such mechanical formula may be analytically straightforward, but, in our view, it falls short of meeting the Court's concerns as expressed in **Yeshiva**.
Id. at 353.

The Board in **American International College**, 282 NLRB 189 (1986), also found faculty members to be managerial employees. The faculty was organized into committees, whose membership was determined through facultywide voting, in general faculty meetings. The monthly faculty meetings were called and presided over by the president of the college or the dean of the faculty. The principal committees were steering, academic standards and student advising, curriculum, admissions and student aid and tenure. Each of these committees was composed of faculty members and administrators, who served as ex officio members. These committees had substantial authority, especially in the area of curriculum. The faculty decided the requirements for admission, course of study, addition and deletion of specific courses, course offerings, scheduling, course content, conditions of graduation, the nature of the degrees to be conferred and the conduct of the educational work of the college. Id. at 190-92.

In finding the faculty to be managerial employees, the Board stated:

Although in theory the deans have veto power over all faculty proposals, they have not in practice countermanded faculty decisions in [academic] areas... The faculty's influence extends beyond strictly academic matters. The faculty played an effective role in planning and designing new facilities and modifications to the existing physical plant....

Another area where the faculty exercises effective authority is tenure. Not only was the faculty a prime developer of the present tenure system, but it is also the only body at the College that, through the tenure committee, is responsible for evaluating the academic qualifications of candidates eligible for tenure. Although the administration

retains control over the budgetary aspects of the tenure awards, this does not detract from the faculty's exercise of authority in evaluating academic credentials of their colleagues.

Faculty members also exercise considerable influence in hiring. Faculty members, particularly department chairmen, are actively involved in soliciting, screening, interviewing, and recommending potential candidates for hire...

Regarding student admissions at the undergraduate level, the faculty plays a very limited role in screening and selecting applicants....

Although the faculty effectively participates in hiring decisions, it exercises only a limited role in terminations... Similarly, the faculty's participation in budget matters is limited since its role is to submit budgets for the respective departments and they have no input regarding the college's overall financial situation. Id. at 201.

In **University of New Haven**, 267 NLRB 939 (1983), the Board found the faculty to be managerial employees where they had substantial authority to effectively recommend decisions which formulated, determined, and effectuated management policies. Specifically, those department chairmen who were bargaining unit members, recruited, hired and supervised part-time faculty, clerical employees and student employees. Id. at 940. Also see **Thiel College**, 261 NLRB 580 (1982), where the Board determined managerial status of the faculty, including department chairmen, who made effective recommendations regarding the hiring of professors, salary increases, promotions, dismissals and grants of tenure.

In **Boston University**, 281 NLRB 798 (1986), enfd. 835 F. 2d 399 (1st Cir. 1987), the Board found the professors to be managerial employees despite the occasional implementation of policies without faculty involvement.

The Board has also found faculty not to be managerial employees in several cases, including **Bradford College**, 261 NLRB 565 (1982), **Cooper Union of Science & Art**, 273 NLRB 1768 (1985), enfd. 783 F. 2d 29 (2nd Cir. 1986), **Florida Memorial College**, 263 NLRB 1248 (1982), **Kendall College of Art & Design**, 279 NLRB 281 (1986), and **St. Thomas University**, 298 NLRB 280 (1990).

In **Florida Memorial College**, supra, the Board found the faculty had insufficient authority to be managerial employees. Although the college had an academic council, where faculty members were in the majority, this body had little authority and was mainly a vehicle to

make announcements concerning actions, which the administration had already decided to take. Moreover, the college had advisory committees, which consisted of some faculty members. These committees met infrequently and did not have the authority to make binding policy decisions. The college dean testified, "faculty recommendations are considered by the administration which may or may not adopt a recommendation depending upon its own evaluation of whether the recommendation is 'sound' ". 263 NLRB at 1249. The administration controlled policies relating to curriculum, retention of students, student absences, graduation requirements and teaching loads. Furthermore, the faculty did not have tenure and the college president made decisions relating to hiring and terminating faculty members. Id. at 1250-51.

Bradford College, *supra*, is another case where, because it had very little authority, the faculty was found not to be managerial employees. The president of the college summarized the faculty's authority, "[M]eetings of the faculty alone have no power to set academic or administration policies. The president must run the college; it cannot be run by the faculty or groups within the faculty -- even by implication." 261 NLRB at 566. The Board found the president and/or dean controlled the following areas of decision-making: all major changes in college curriculum; teaching loads or requirements; faculty evaluations and salaries; hiring of new faculty members; faculty retention school calendars; admission policies; and student grade changes. Id.

In **Kendall College of Art & Design**, *supra* at 292, the Board explained its basis for finding the faculty not to be managerial employees as follows:

[T]he faculty as a whole and individually exercises astonishingly little power as best exemplified by the individual faculty member's inability to make independently even those decisions basic and necessary to teaching their own classes. These include determining course content, choosing the text, taking field trips, canceling class sessions, trading classes or using a substitute teacher....

...The trustees, with the administration, set salaries, employment benefits, course load and requirements, faculty policies as set forth in the faculty handbook, matriculation, retention and graduation requirements, tuition and fees, school calendar, enrollment, and approval of hiring and firing. Major decisions as to the future of the school have been made by the administration, with at most post facto presentation to the faculty of accomplished acts.... Day-to-day decisions, such as hiring, firing, and

discipline, the manner in which hiring is to be accomplished, transfers, provisions for a day off and use of evaluations are all rendered solely by the administration.

In ***Cooper Union of Science & Art***, supra., the institution's by-laws vested the president with general supervisory powers including the appointment and removal of administrators, faculty, and staff and the determination of their duties. The institution consisted of three schools -- Art, Architecture, and Engineering. Each school had governance committees, in which the faculty were in the minority on most committees, and the dean chaired the most authoritative committee. The institution had been restructured on several occasions without faculty participation wherein the following changes occurred: an increase in class size; reduction in number of full-time faculty; schools restructured by eliminating divisions and dividing the School of Art and Architecture into separate schools; establishment of the "Faculty of Liberal Arts and Science", which removed those faculty members from the ability to participate in committees; elimination of curricula leading to degrees in math, physics and distributive science; in the School of Engineering, elimination of the administrative committee with that authority being delegated to the dean; and a library consortium agreement being entered into with New York University, whereby the institution lost control of its library. Furthermore, decisions on hiring, promotion and tenure were frequently made by the administration without faculty input and even when such input was provided, it was frequently ignored. 273 NLRB at 1770-71, 1775. Thus, the Board found the employees were not managerial.

In ***St. Thomas University***, supra, the Board also found the faculty members were not employees within the meaning of the Act. The faculty participated in decision-making through the Faculty Forum, which had the authority to make recommendations to the administration. The Faculty Forum's recommendations had been ineffective. The Faculty Forum had five standing committees, which met infrequently, and any recommendations had been ignored by the administration. The administration had university committees, which were primarily composed of administration officials. One of those committees, the Division Chairpersons

Committee, which had no faculty members, proposed and drafted virtually every academic policy and curriculum change of the university. The faculty were not involved in the hiring of new faculty. Even on such minor matters as textbook choice and guest speakers, the administration had the final decision-making authority. Furthermore, in 1986, the university was restructured, based upon a consultant's report, from nine divisions to five divisions. The faculty did not play a role in this plan nor approve the restructuring plan. Similarly, the administration unilaterally established a law school. 298 NLRB at 280-82.

Thus, the Board concluded the faculty were not managerial employees because:

...[I]t is the St. Thomas administration and not the faculty that plays the predominant role in determining the University's curriculum, grading policies, admission and matriculation standards, teaching methods, faculty hiring, and tenure. The administration proposes, drafts, and adopts the vast majority of academic policy and curriculum changes. The faculty must apply a grading schedule provided by the administration and has been ordered by the administration to grade within a certain range.

Id. at 286.

In the instant case, the faculty possesses the type of authority discussed in **Yeshiva**; thus, I find the faculty are managerial employees. In making such a finding, I have relied on the record evidence, which I will summarize below.

The College's bylaws specifically describe the faculty as having the "primary responsibility... to determine policies and make decisions regarding curriculum, subject matter and matters of instruction, research, faculty status". The record evidence establishes that the faculty exercises this authority. Concerning the bylaws, the record evidence reflects that changes to the bylaws are initiated and approved by the faculty. Approval by the Board of Trustees is routine. The single instance cited by the Petitioner regarded the use of the term "negotiate" and did not constitute a rejection of a bylaw. The Petitioner's assertion that the necessity for approval of the bylaws and changes thereto by the Board of Trustees demonstrates they have absolute authority is without merit. See **Yeshiva**, 103 LRRM 2531, fn.

17. As previously stated, the Board of Trustees has never rejected an amendment to the bylaws.

The faculty determines policies and makes decisions in their regular monthly meetings as well as in the numerous faculty committee meetings. At these meetings, faculty members are the only individuals who exercise voting rights.

The overwhelming evidence reflects that the faculty develops and administers the curriculum of the College. Specifically, the professors determine what courses will be taught each semester, the content of each course, whether the courses will limit the number of students, whether an attendance policy will be in effect, and if so, what the attendance policy will be. Moreover, each department's faculty determines the number of sections for each course, the dates and times for each course to be taught²⁹, requirements for a major or minor and requirements to be an honors graduate.

Curriculum changes must be approved by the Academic Policy Committee (APC), which is governed by six faculty members. The record evidence established that the APC has extensive authority over curriculum changes. Professor Murray stated the APC was the "final voice" on curriculum changes. Specifically, this authority includes approval of new "second areas of strength" and programs and recommending to the faculty the approval of new majors and degrees³⁰ and elimination of other majors.³¹ When the portfolio system, Preceptorial

²⁹ The fact that the registrar may request a different time due to scheduling conflicts, additional sections due to overcrowding or the deletion of a course due to under enrollment does not distract from the initial authority of the faculty to set these conditions.

³⁰ The fact that the Provost did not submit the new major of African Studies to the State of New York Education Department is not evidence of the administration vetoing the faculty's decisions in light of the fact the Education Department had previously informed the College that no new majors would be approved.

³¹ Other curriculum-related changes, such as elevating the Education Department to the School of Education and renaming the Department of Religion to be the World Religions Department, have needed faculty approval.

program, grading system³² and Honors program were initiated and/or revised, it was the APC and the faculty who had the authority on these matters. Only in isolated instances have curriculum changes been made by the administration, rather than the faculty. These isolated instances include the creation of the intersession and the expansion of distance learning programs. These isolated instances are insufficient to establish the administration controls the curriculum. See **Lewis & Clark**, 300 NLRB at 162-63; **Boston University**, 281 NLRB 798 (1986).

Furthermore, Petitioner's assertion that the President has veto power over curriculum changes is unsupported by the record. Petitioner cited the preceptors voting to eliminate the honors section but the President refusing to do so. The record evidence reflected the President told the preceptors that the honors section had already been used as a recruiting incentive and published in the catalog. Thus, the preceptors decided against eliminating the honors section.

The Petitioner also argues that since the President and Provost have requested curriculum changes or appointed committees of faculty members to study curriculum changes that this demonstrates that the faculty are not managerial employees. This argument fails to recognize that it is still the faculty who must study and approve the curriculum changes, not the administration. Moreover, the faculty has rejected various curriculum proposals initiated by the administration.

The faculty, through the Board of Academic Standards, determines which students may graduate and any honors they may receive. The decision of the Board is final and is not subject to approval by the administration.

Another area where the faculty effectively manages the College concerns the reappointment, promotion and grant of tenure to professors. The Supreme Court in **Yeshiva** found authority in this area to be of critical importance. As set forth earlier in this Decision, the

³² The Petitioner correctly points out one isolated instance where the administration, through the Dean of Studies controls a grade – the approval of an “incomplete”.

faculty's recommendations on reappointment, promotion and grant of tenure have been followed approximately 90% of the time. The Petitioner asserts this is not evidence of effective recommendation because the President did not follow all of the recommendations. This assertion is clearly contrary to established Board law. See **Lewis & Clark College**, 300 NLRB 155, 163 (1990).

On budget matters, the faculty plays a role but does not effectively exert control. Instead, its role in setting the budget is to provide input into the needs of the College and then have the administration prioritize those needs. Regarding faculty salaries, the faculty played an integral role in achieving the wage increases, which were effective in 1997, but less of a role in the 2001 wage increases. The Board held in **Livingstone College**, 286 NLRB at 1313-14, and **American International College**, 282 NLRB at 201, that a lack of any authority in these areas does not preclude a finding that the faculty are managerial employees.

The faculty's role in admissions is also diminished in comparison to other areas of the College. Their role varies from department to department with the faculty within a few departments having effective control over their admissions and the faculty in the majority of the departments only having an advisory role. This role is similar to the faculty's role in **Lewis & Clark College**, where the Board found the faculty to be managerial.

The faculty effectively makes the decisions on the hiring and firing of professors and adjunct professors. The recommendations are made by the department faculty or the department or program chair and these recommendations are almost always followed. Their authority in hiring and firing is similar to the faculty's authority in **Yeshiva**. Moreover, the authority of department chairs to effectively hire faculty does not diminish the overall faculty's managerial role. See **University of New Haven**, 267 NLRB at 940; **American International**, *supra*, at 201.

The creation of ad hoc committees by the President does not diminish the faculty's managerial role since the committees consist of faculty members and the standing faculty

committees must approve any proposed changes in curriculum or related subjects. These committees are similar to ones found in *Lewis & Clark*, supra, at 158, wherein the Board found the faculty to be managerial employees.

In conclusion, the record evidence reflects that the faculty are managerial employees in that they formulate and effectuate management policies by expressing and making operative decisions for the Employer. The evidence also reflects that the department chairs and program chairs recruit, interview and effectively recommend the hiring of adjunct professors and other department employees, regularly review their performance and effectively recommend their retention or release. Accordingly, I find that the department chairs and program chairs are statutory supervisors within the meaning of Section 2(11) of the Act. Based on my finding that the faculty are managerial employees, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED, that the Petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **November 23, 2001**.

DATED at Memphis, TN this 9th day of November, 2001.

/S/

Ronald K. Hooks, Director, Region 26
National Labor Relations Board
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